

TIMOTHY C. FOX  
Montana Attorney General  
LAWRENCE VANDYKE  
Montana Solicitor General  
JON BENNION  
Deputy Attorney General  
Justice Building  
P.O. Box 201401  
Helena, MT 59620-1401  
Telephone: (406) 444-2026  
Fax: (406) 444-3549  
jonbennion@mt.gov

ORIGINAL

FILED

DEC 18 2013

*Ed Smith*  
CLERK OF THE SUPREME COURT  
STATE OF MONTANA

## IN THE SUPREME COURT OF THE STATE OF MONTANA

No. OP 13-0808

MEA-MFT, the Montana State AFL-CIO, the Montana  
Public Employees Association, the Montana Human  
Rights Network and the American Federation of State,  
County and Municipal Employees, Montana Women  
Vote, and Western Native Voice,

Petitioners,

v.

STATE OF MONTANA HONORABLE  
TIM FOX, in his capacity as Attorney General,

Respondent.

**ATTORNEY GENERAL'S RESPONSE TO PETITION CHALLENGING  
THE LEGAL SUFFICIENCY OF LR-126**

Pursuant to Mont. Code Ann. § 13-27-316(2), the Attorney General of the  
State of Montana hereby offers this response to the above-captioned petition filed

December 3, 2013 and served by U.S. mail on the Attorney General. This Court granted an extension of time to file this response to December 18, 2013.

### **BACKGROUND**

Legislative Referendum No. 126 (LR-126) is an act to change Montana's voter registration laws. More specifically, it eliminates same-day voter registration by amending the deadline for late registration to the Friday before an election at 5 p.m. In addition, in order to ensure compliance with the National Voter Registration Act (NVRA), LR-126 requires voter registration forms attached to each driver's license application for mail registration to conform to NVRA. *See* 42 U.S.C. § 1973gg. LR-126, a proposed referendum, was numbered Senate Bill 405 in the legislative session, and was based on House Bill 30, which was a regular bill that passed through both chambers and was vetoed by Governor Bullock.

Following the 2013 Legislative Session, the Attorney General conducted a legal sufficiency review pursuant to Mont. Code Ann. § 13-27-312. As required by law, the Attorney General's office prepared a draft statement of purpose and implication, because the Legislature did not provide one. *See* Mont. Code Ann. § 13-27-315. After soliciting public comment from interested parties, the Attorney General made modifications to the proposed statement of purpose and implication. At the end of the 30-day statutory timeframe, the Attorney General

informed the Secretary of State that LR-126 did not conflict with another ballot issue that may appear in the same election, was legally sufficient to be referred to voters, and forwarded the final statement of purpose and implication.

The Attorney General's office was served by U.S. mail with the Petitioners' suit challenging the Attorney General's legal sufficiency review and the statement of purpose and implication. The Secretary of State's Office was not named in the petition.<sup>1</sup> Petitioners have asked the Court to find that the proposed issue does not comply with statutory and constitutional requirements governing submission of the issue to the electors, that the issue is void, and that it may not appear on the ballot.

### **ARGUMENT**

Petitioners challenge the determination of legal sufficiency of LR-126, claiming that the Attorney General failed to properly review the ballot issue. Specifically, Petitioners allege that the Attorney General should have rejected the referendum from the Legislature because the bill's title contains a false statement regarding compliance with the NVRA. Petitioners argue the referendum's amendments have nothing to do with ensuring compliance with NVRA.

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<sup>1</sup> As in the challenge to LR-127, the Petitioners have asked that LR-126 be removed from the ballot, which would require the Secretary of State to be a party to this action. The Secretary of State oversees matters involving ballots and election procedures.

Petitioners' argument fails because LR-126 *does* contain language regarding the NVRA that is accurately summarized in the referendum's title and addresses a concern raised by legislative staffers. Petitioners' arguments are also based on a misreading of the Attorney General's authority in the review of referenda for legal sufficiency. Finally, if the Court adopts Petitioners' misguided interpretation of the Attorney General's legal sufficiency authority, the same interpretation would allow the Court to revise the bill title to amend any perceived inaccuracies or misleading statements. The Court should reject the petition and allow LR-126 to move forward to voters.

**I. THE ATTORNEY GENERAL'S LEGAL SUFFICIENCY REVIEW IS LIMITED BY STATUTE AND COMMON LAW.**

This Court has long recognized that the referendum provision of the Constitution "should be broadly construed to maintain the maximum power in the people." *Reichert v. State*, 2012 MT 111, 365 Mont. 92, 278 P.3d 455 (Baker, J., dissenting) (quoting *Nicholson v. Cooney*, 265 Mont. 406, 411, 877 P.2d 486, 488 (1994)). In the few cases where a referendum has been struck, this Court has determined that the proposed ballot issue clearly violates statutory or constitutional requirements, such as where the measure is "unquestionably and palpably unconstitutional on its face." *Id.* (quoting *State ex. rel. Steen v. Murray*, 144 Mont. 61, 69, 394 P.2d 761, 765 (1964)).

To our knowledge, the Court has yet to find that a referendum was improperly reviewed by the Attorney General in light of the narrow powers and duties assigned to the office in the legal sufficiency review process. The Attorney General is charged only with “examin[ing] the proposed [ballot] issue for legal sufficiency . . . ,” which includes assessing whether “the petition complies with statutory and constitutional requirements governing submission of the proposed issue to the electors.” Mont. Code Ann. § 13-27-312(1) and (7). In other words, the legal sufficiency analysis is limited to a procedural review as to the legal form of the proposed initiative. *See Montanans Opposed to I-166 v. Bullock*, 2012 MT 168, 365 Mont. 520, 285 P.3d 435. The Attorney General’s review serves as an early-warning system, identifying and disqualifying non-substantive legal deficiencies regarding submission of the petition to voters, while leaving close, substantive questions to later judicial review rather than short-circuiting the democratic process at the earliest stage.

The statutory requirements that guide legal sufficiency review are set out in Mont. Code Ann. §§ 13-27-201 and -204, which provide for the form of the petition. Within the Constitution, article III, section 5 provides that the subject of the initiative may encompass “all matters except appropriations of money.” LR-126 met these requirements, and thus the Attorney General properly certified it as legally sufficient.

## **II. PETITIONERS' ARGUMENTS FALL OUTSIDE OF THE STATUTORY AND COMMON LAW GUIDELINES FOR THE ATTORNEY GENERAL'S LEGAL SUFFICIENCY REVIEW FOR A REFERENDUM.**

Petitioners' arguments regarding LR-126's legal sufficiency not only fall outside of the Attorney General's typical review, but they are based on faulty readings of Montana statutory law. Petitioners state:

14. The Montana Code requires that the ballot statements for ballot issues be true and impartial. § 13-27-312(4), MCA. The Montana Code also requires the Attorney General to review the ballot issue for legal sufficiency, which includes compliance with the requirement that ballot statements be true. The title of SB-405/L-126 is required to be included as part of the statements presented to voters on the ballot. Section 13-27-501(2) and (3), MCA. Further § 6 of SB-405 specifically states that the measure shall be submitted to the electorate 'by printing on the ballot the full title of (this act).'

Pet. at 5.

Reading the entire statute, it is clear that the bill title is not part of the ballot statement referenced in Mont. Code Ann. § 13-27-312. The ballot statements in that statute are the 135-word summary of the ballot issue and, if applicable, the 50-word fiscal note summary. *See* Mont. Code Ann. § 13-27-312 (2)(a)-(b).

Pursuant to law, the Attorney General's office prepared a draft ballot statement of purpose and implication, because the Legislature did not provide one. *See id.*

§ 13-27-315. The Attorney General, as part of the review process, must seek out parties on both sides of the issue and obtain their advice. *See id.* § 13-27-312 (2).

Because the ballot statements are limited to the 135-word summary of the ballot

issue and, if applicable, the 50-word fiscal note summary, the bill title cannot be considered part of the overall ballot statements.

The Legislature and the Court have made it clear that the Attorney General's legal sufficiency review is narrow. The Attorney General does not have the authority to change bill titles or add, delete or otherwise change what is contained within the ballot measure itself. According to law, petitioners who challenge an initiative or referendum's ballot statements are given an opportunity file an original proceeding in the Court to overturn the Attorney General's wording and provide their own statement, but bill titles are not a part of that process either. *See* Mont. Code Ann. § 13-27-316.

Petitioners' claims fall outside of the normal legal sufficiency review process outlined by Montana statute and interpreted by the Court in prior cases. The narrow scope of the review is drawn from language in Mont. Code Ann. § 13-27-312(7) (stating that the scope of review does not encompass "consideration of the substantive legality of the issue if approved by the voters.") and the short 30-day time frame of the legal sufficiency review and the 10-day window when a petitioner may challenge the review. While attempts have been made to challenge legal sufficiency reviews, the Court has seen those challenges as falling outside the narrow review process that has been often described as a procedural review. *See, e.g., Montana Consumer Finance Ass'n v. State of*

*Montana*, 2010 MT 185, 357 Mont. 237, 238 P.3d 765; *Montanans Opposed to I-166 v. Bullock*, 2012 MT 168, 365 Mont. 520, 285 P.3d 435.

It is not the role of the Attorney General to substitute the Legislature's judgment with his own on matters that fall outside of the typical legal sufficiency review, especially when the Legislature has not empowered the Attorney General to make modifications to a referendum's title. In prior cases, the Court has agreed and even declined to substitute its own judgment out of deference to an equal branch of state government. For this reason, Petitioners' challenge to the bill title should be rejected because it falls outside of the legal sufficiency review process.

### **III. LR-126'S BILL TITLE ACCURATELY REFLECTS AMENDMENTS WITHIN THE REFERENDUM AND ADDRESSES CONCERNS RAISED BY LEGISLATIVE STAFF.**

Even if the Petitioners' challenge falls within the Attorney General's legal sufficiency review process, their challenge should fail. Petitioners' challenge to the legal sufficiency review relates to an alleged false statement contained in the bill's title from the Legislature. Petitioners assert that the Attorney General should have rejected the referendum from the Legislature because the bill's title contains an inaccurate statement regarding compliance with the NVRA. Their reasoning is not supported by the text of the referendum or the legislative history in the passage



of Senate Bill 405 (LR-126). And it applies the wrong standard for evaluating bill titles in any event.

The NVRA set the first ever national standards for mail-in voter registration, required states to provide registration at public agencies, outlawed the purging of voters solely for non-voting, established the nation's first federal standards for voter list maintenance and the first national voter registration application. The NVRA became effective in most states on January 1, 1995, when it applied to 44 states and the District of Columbia, including Montana. Section 4(b) of the Act provided that states were exempt from NVRA if, as of August 1, 1994, they had no voter registration requirements or had same-day election registration at polling places. Six states met those requirements: Idaho, Minnesota, New Hampshire, North Dakota, Wisconsin, and Wyoming. Montana didn't pass same-day voter registration until 2005.

Confusion arose in the 2013 Legislative session regarding the applicability of NVRA to a state that had adopted same-day voter registration after NVRA's August 1, 1994 deadline, only to eventually repeal the same-day voter registration law at a later date. The confusion was raised by a legislative staffer in the drafting notes for House Bill 30, which Senate Bill 405 (LR-126) was based on:

If same day voter registration is repealed, Ntl. Voter Registration Act becomes applicable and each driver's license application serves as a concurrent voter registration. MT does provide for driver's license registrations (61-5-107) but it is not clear whether the forms

proscribed by the Secretary of State are compliant with 42 USC § 1973gg-3 without reviewing the forms themselves.

*See Ex. A.*

The question about whether Montana's forms were in compliance with NVRA was resolved by inserting language into House Bill 30 and Senate Bill 405 (LR-126). ("and in compliance with the National Voter Registration Act of 1993, Public Law 103-31, 42 U.S.C. 1973gg, et seq."). For legislative staffers and legislators, this language was intended to remove doubt about Montana law's interaction with NVRA and to give clear instruction to the Secretary of State's Office and the Motor Vehicle Division. The language inserted into Senate Bill 405's title mirrors the intent of legislators in addressing questions regarding Montana's compliance with NVRA if voters were to repeal same-day voter registration.

Petitioners are not the first to challenge the bill title of a referendum. In *Harper v. Greely*, 234 Mont. 259, 260, 763 P.2d 650 (1988) the plaintiffs asked the Court to void a legislative referendum to amend the state constitution regarding the provision of economic assistance and social and rehabilitative services. They argued the bill title and the ballot statement provided by the 50th Legislature were untrue, misleading, and unfair. *Id.* at 263. In that case, the Court rejected using the statutory standards for ballot statements to judge whether the bill title was accurate. *Id.* at 265. Instead, the Court said the title should be examined according

to the same standard applied to other *legislation*. *Id.* That includes applying the constitutional requirement of “clearly expressing the subject” in the title pursuant to article V, section 11(3) of the Montana Constitution. *Id.* at 265-66.

To judge the accuracy of the bill title, the Court in *Harper* applied five principles set out in *State v. McKinney*, 29 Mont. 375, 74 P. 1095 (1904), all of which emphasize deference to the Legislature. These principles include: (1) preventing laws from being enacted surreptitiously; (2) recognizing that the legislature is a “co-ordinate” branch of government, whose actions should ordinarily be sustained in order to prevent interference of proper legislative functions; (3) recognizing that the Court should not void a title merely because, in its opinion, a better one might have been used; (4) recognizing that if the title directly or indirectly relates to the body of the bill itself, that should be sufficient; and (5) recognizing that any lingering doubt after applying these four principles should be resolved by sustaining the bill. *Id.* at 266-67. When the Court in *Harper* applied these five principles, the title was deemed legally sufficient. *Id.* Moreover, the Court recognized that unnecessarily voiding a referendum would infringe on Montanans’ constitutional rights of popular sovereignty and self-government. *Id.* at 267-68.

Petitioners here are effectively asking the Court to defer to their judgment, not the Legislature’s. They are asking the Court to do the very thing it declined to

do in *Harper*, which is to apply the standard used to evaluate ballot statements in evaluating a bill title. Such a standard does not give proper deference to the Legislature and the lengthy process any referendum goes through to get to the Attorney General's desk for a legal sufficiency review. For Senate Bill 405 (LR-126), the bill had committee hearings in both legislative chambers, the bill's title remained intact through the entire process, and the title put all legislators on notice as to the bill's contents. Efforts to amend the bill title failed in the process.

Applying the proper standard to evaluate the bill title, the language accurately and directly reflects what is contained in the bill. In addition, the inclusion of the NVRA amendments and corresponding bill title reference resolved a question raised by legislative staff by unequivocally stating the Legislature's intent to follow NVRA. Senate Bill 405 (LR-126) had a rigorous and spirited debate, but was supported by the requisite number of legislators to enable the referendum to proceed to the ballot. Voters should have an opportunity to exercise their constitutional right to vote on a matter referred by the Legislature.

**IV. IF THE COURT ACCEPTS PETITIONERS' INTERPRETATION REGARDING THE STANDARD USED TO JUDGE THE BILL TITLE, THE SAME INTERPRETATION WOULD ALLOW THE COURT TO REVISE THE BILL TITLE.**

If Petitioners' new theories about the Attorney General's legal sufficiency review are accepted by the Court, they are also implicitly arguing that the Court

has the authority to modify the bill title. Montana Code Annotated § 13-27-316(3)(c)(ii) allows the Court to order the Attorney General to revise the ballot statements within five days. If the Court believes the bill title is included in the ballot statement, it could revise the bill title that would appear on the ballot to address any deficiencies it perceives. Additions, deletions, or amendments could be made to address any falsities within the bill title. Doing so would allow voters to exercise their constitutional rights to vote on matters referred by the Legislature and also satisfy Petitioners' final request in their petition. *See* Pet. at 6 ("That the Court allow any further relief which it may deem just, equitable and proper.").

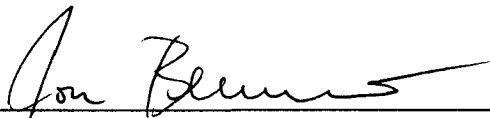
This would be an unprecedented move, however, and one that could open the door to further mischief in the ballot issue process. This extreme measure is one that would only stem from an extremely strained interpretation of Montana law and the traditional legal sufficiency review of the Attorney General for ballot issues. The Attorney General respectfully requests the Court to refrain from paving new legal ground on such matters. The best course of action for the Court is to sustain the Attorney General's legal sufficiency review and allow LR-126 to be on the ballot for Montanans to vote on in the general election.

## CONCLUSION

For the reasons stated above, Petitioners' arguments regarding the Attorney General's legal sufficiency review have no merit. The petition should be denied, and LR-126 should proceed to a vote of the people.

Respectfully submitted this 18th day of December, 2013.

TIMOTHY C. FOX  
Montana Attorney General  
LAWRENCE VANDYKE  
Montana Solicitor General  
JON BENNION  
Deputy Attorney General  
Justice Building  
P.O. Box 201401  
Helena, MT 59620-1401

By:   
\_\_\_\_\_  
JON BENNION  
Deputy Attorney General

**CERTIFICATE OF SERVICE**

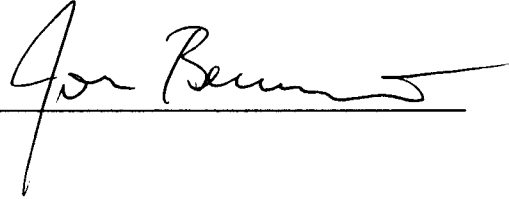
I hereby certify that I caused a true and accurate copy of the foregoing document to be mailed to:

Mr. John M. Morrison  
Mr. Frederick F. Sherwood  
Morrison, Sherwood, Wilson  
and Deola, PLLP  
401 North Last Chance Gulch  
P.O. Box 557  
Helena, MT 59624-0557

Ms. Linda McCulloch  
Montana Secretary of State  
P.O. Box 202801  
State Capitol, Room 260  
Helena, MT 59620-2801

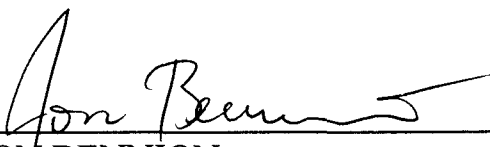
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## **CERTIFICATE OF COMPLIANCE**

I certify that this Response is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 2,864 words, excluding certificate of service and certificate of compliance.

  
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